

**OFFICE OF ZONING AND ADMINISTRATIVE HEARINGS  
FOR MONTGOMERY COUNTY, MARYLAND**

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**[www.montgomerycountymd.gov/content/council/zah/index.asp](http://www.montgomerycountymd.gov/content/council/zah/index.asp)**

**PETITION OF NELLY AND MOSES SOLANO \*  
for a special exception for a child day care \*  
facility (a child day care center) for up to \*  
30 children on property located at 13905 \*  
Darnestown Road, Darnestown, Maryland \***

\*\*\*\*\*

Nelly Solano \*  
Jenny Solano \*  
Craig Moloney \*  
\*  
\*

For the Petition \*  
\*\*\*\*\*

Kraig Bauer \*  
\*

In Support of the Petition \*  
\*\*\*\*\*

Linda Oxley \*  
Roger Oxley \*  
Sylvia Trunnell \*  
\*

In Opposition to the Petition \*  
\*\*\*\*\*

Before: Lynn A. Robeson, Hearing Examiner

Special Exception No. 12-01

**HEARING EXAMINER'S OPINION AND DECISION**

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## I. STATEMENT OF THE CASE

Petition S.E. 11-2, filed on November 17, 2011, requests a special exception to operate a child day care center for up to 30 children.<sup>1</sup> The facility would be located in the lower level of an existing one-family, detached home at 13905 Darnestown Road, Darnestown, Maryland, in the R-200 Zone.

Petitioners, who own and reside in the home with their daughter, have been operating an existing licensed child care business (*i.e.*, a “group day care home”) for up to 12 children (Exhibit 8). There is no special exception for the existing group day care home because such a facility is permitted without a special exception in the R-200 Zone; however, a special exception is required to operate a child day care center in the R-200 Zone, pursuant to Zoning Ordinance §59-C-1.31(d). The day care facility is called “Little Footprints Early Care and Initial Education Center.” Exhibit 8.

Under the provisions of the Zoning Ordinance, §59-G-1.12, the Hearing Examiner is authorized to hear and decide this type of petition. On February 3, 2012, the Office of Zoning and Administrative Hearings issued a notice that the public hearing would be held before the Hearing Examiner on Friday, April 19, 2012, at 9:30 a.m., in the Second Floor Hearing Room of the Stella B. Werner Council Office Building (Exhibit 25). A second notice was issued on February 9, 2012, correcting the day to “Thursday”, April 19, 2012. Exhibit 26.

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<sup>1</sup> A “child day care center” is one of three types of “child day care facilities” defined in Zoning Ordinance §59-A-2.1. The other two are “family day care homes” for up to 8 children and “group day care homes” for up to 12 children. A “child day care center” is defined in §59-A-2.1 as:

- a. a dwelling in which child day care services are provided and the provider is not a resident and does not meet the requirements for a non-resident provider of a family day care home or a group day care home, or;
- b. a building in which child day care services are provided:
  - 1) for 13 or more children, or;
  - 2) which exceed the staffing limits of a family day care home, or a group day care home, or;
  - 3) for 24 hours a day provided that they are in conformance with state and local regulations.

The Technical Staff of the Maryland-National Capital Park and Planning Commission reviewed the petition and, in a report dated March 22, 2012, recommended approval with conditions, set forth below (Exhibit 30(a)):<sup>2</sup>

1. All evidence, testimony and exhibits of record are binding on the applicant.
2. The child care use must be limited to 30 children not older than four years of age, and five non-resident employees.
3. Permitted hours of operation are Monday through Friday, 6:30 a.m. to 6:30 p.m.
4. The arrival and departure for children must be staggered between 6:30 a.m. and 10:30 a.m. and between 2:30 p.m. to 6:30 p.m., respectively.
5. The applicant must comply with Maryland State and Montgomery County standards for the operation of a child day care facility.

The Montgomery County Planning Board (“Planning Board”), on April 5, 2012, voted (4-0) to endorse the Technical Staff’s recommendations, except for the Petitioners’ proposed sign. The Board also modified Condition Nos. 2 and 6 of the Technical Staff Report as follows:

2. The child care use must be limited to 30 children not older than four years of age, and ~~five non-resident employees~~ two resident employees, and four non-resident employees (three full-time and one part-time).
6. Trees to be planted should be a minimum two and a half inch caliper.

Exhibit 29(b). On April 10, 2012, Technical Staff issued a Supplementary Report, clarifying issues related to staffing, parking and signage. Exhibit 29(a). In particular, Staff found that the proposed sign was incompatible with the neighborhood due its size (i.e., three times the permitted size) and because it was proposed to be illuminated. Exhibit 29(a), p. 3.

The Hearing Examiner received one pre-letter of opposition to the application raising concerns about increased traffic on Darnestown Road, the potential danger to cyclists and pedestrians and questioning whether the septic system was sufficiently sized for the use. Exhibit 28. Pre-hearing letters of support stressed the merits of the existing program. Exhibits 21(a)-(i).

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<sup>2</sup> The Technical Staff report is frequently quoted and paraphrased herein.

The hearing was convened, as scheduled, on April 19, 2012, and testimony was presented in support of the petition by Petitioners and three other witnesses, including a registered architect. Petitioners amended the Petition to remove the request for a sign along Darnestown Road. T. 7. She also adopted the findings and conclusions in the Technical Staff report as a part of her testimony and agreed to the conditions Staff recommended. Testimony in support described the existing and proposed operations, answered questions of those opposing the application, and supported the facility. T. 6-73, 75-77. Adjacent neighbors along the northeast property line opposed the petition because of noise from the existing daycare, the visual impact on their property, and erosion from the property. Other opposition testimony raised concerns regarding health and traffic. T. 55-64. At the public hearing, the Petitioners amended her landscape plan to include five additional Leyland Cypress trees along the northeast property line. Exhibit 36(a); T. 85-86. The record was held open until April 30, 2012, to permit Technical Staff to review the changes to the Landscape Plan T. 91. Technical Staff did respond approving the revised plan (Exhibit 37), and the record closed on April 30, 2012.

Based on a thorough review of the entire record, the Hearing Examiner concludes that the special exception should be granted, subject to the conditions prescribed herein.

## **II. FACTUAL BACKGROUND**

### **A. Subject Property**

The proposed child day care center would operate in the finished basement of an existing, single-family, two-story, detached home at 13905 Darnestown Road, Darnestown, Maryland. The property's legal description is Block A, Lot 17, Seneca Highlands subdivision, consisting of approximately .781 acres. The lot is shaped like a pentagon, longer on the east and west sides than the northwest, northeast and southern property boundaries. Exhibit 30(a), p. 2. Technical

Staff reports that the existing daycare is housed in the 1,900 square foot walkout basement. A stockade fence runs along the western side of the property, and a post and rail fence border the southern property line. There is a three-rail split style fence on the eastern property lines and a six-foot lattice vertical board fence on the northeast property line. Neighbors along the northeast property line (Mr. and Mrs. Oxley, who appeared at the hearing), have planted evergreens along their property's border with the subject property. Exhibit 30(a), T. 55, 60.

Technical Staff advises that forty-foot tall pine trees run along the eastern lot line, seventy-five foot tall coniferous trees are on the northern lot line, forty-foot tall Leyland Cypressess range along the western lot line, and a portion of the southern lot boundary is lined with forty-foot tall pine trees. Exhibit 30(a), pp. 2-3. Photographs of the existing dwelling, the play area, the property boundaries, and the exterior yard submitted by the Petitioners are shown below and on the following pages (Exhibit 19).



**(a) SUBJECT PROPERTY DRIVEWAY ENTRANCE STREET WEST VIEW**

**Exhibit 19(a)**  
**View from South (Darnestown Road)**



**(c) SUBJECT PROPERTY FRONT SOUTH VIEW**

**Exhibit 19(c)  
View from South (Darnestown Road)**



**(d) SUBJECT PROPERTY REAR NORTH VIEW**

**Exhibit 19(d)  
View from North**





(f) SUBJECT PROPERTY LEFT SIDE NORTHEAST VIEW

EXHIBIT NO. 19

**Exhibit 19(f)  
View of Play Area from Northeast**



**Play Area**

**Shed (Shown on  
Site Plan)  
Bordering  
Oxley's Property**

(l) SUBJECT PROPERTY REAR YARD NORTH VIEW

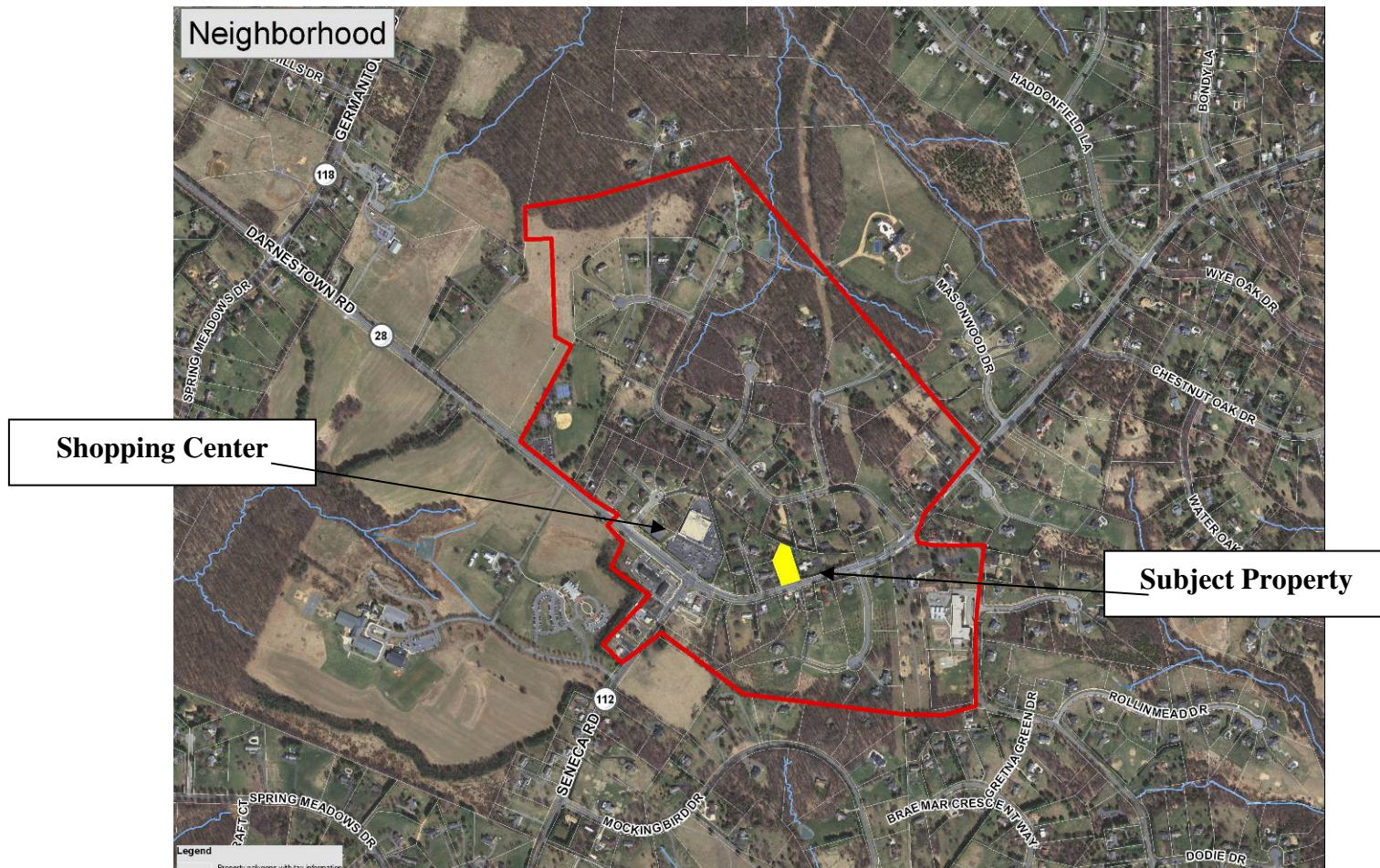
EXHIBIT NO. 19

**Exhibit 19(l)  
View of Northeast (Oxley's)  
Property Boundary**



## B. Surrounding Area

The boundaries of the surrounding area delineated by Technical Staff are shown in the aerial photograph from the Staff Report in red (Exhibit 30(a), p. 4):



Staff advises that the area includes the “commercial heart” of Darnestown Village—a shopping center including a grocery, gas station, and small-scale retail and office uses. These are zoned C-1 with a Rural Village Overlay. According to Staff, the shopping center is bordered by low-density residential uses in the R-200 and RC zones (to the north) and in the RE-2 Zone south of Darnestown Road. Special exceptions in the area include a gas station, a home occupation for lawn mower repairs, and a telecommunications facility. Having no evidence to the contrary, the

Hearing Examiner adopts Technical Staff's delineation of the neighborhood and finds the neighborhood characterized by a mix of local retail uses and low-density residential dwellings. The subject property is located more proximate to the commercial uses and R-200 zoning than the larger lot, RE-2 and RC zoning.

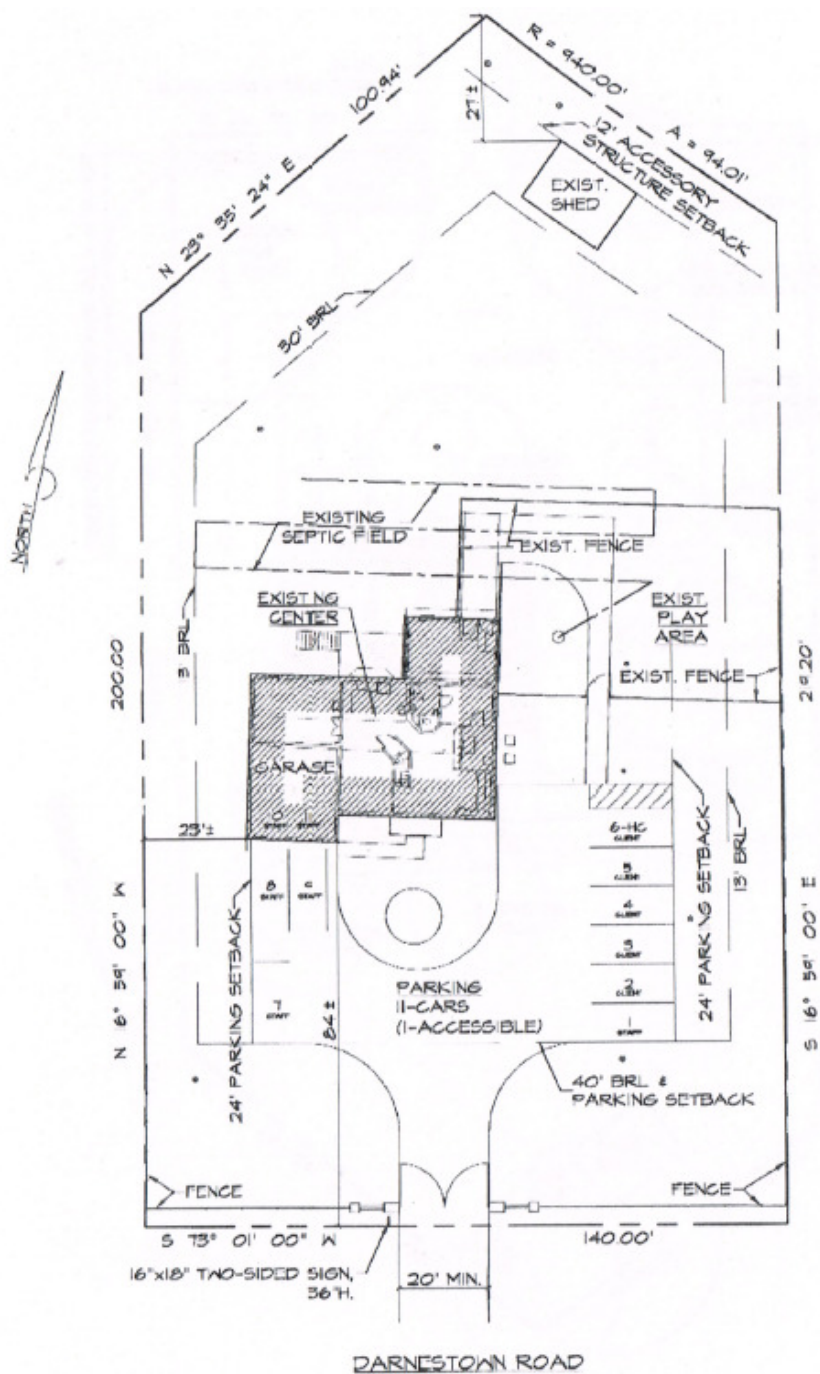
### **C. The Proposed Use**

#### **1. The Proposed Use:**

Petitioners, who own and reside in the home with their daughter, have been operating a licensed child care business (*i.e.*, a “group day care home”) in her home for up to 12 children. Petitioners propose to expand the existing “group day care home” for up to 12 children into a “child day care center” for up to 30 children, ranging in age from infants to four-years old. Exhibit 8. There is no special exception for the existing group day care home because such a facility is permitted without a special exception in the R-200 Zone; however, a special exception is required to operate a child day care center in the R-200 Zone, pursuant to Zoning Ordinance §59-C-1.31(d). The day care facility is called “Little Footprints Early Care and Initial Education Center.”

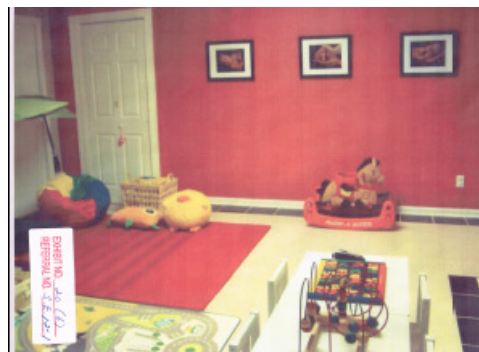
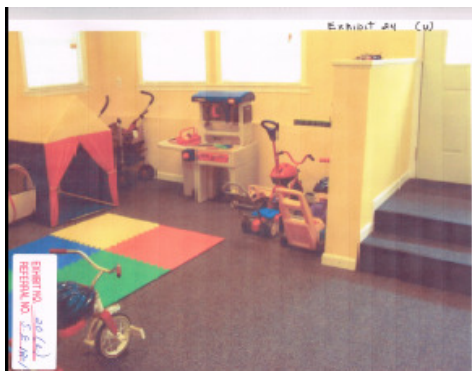
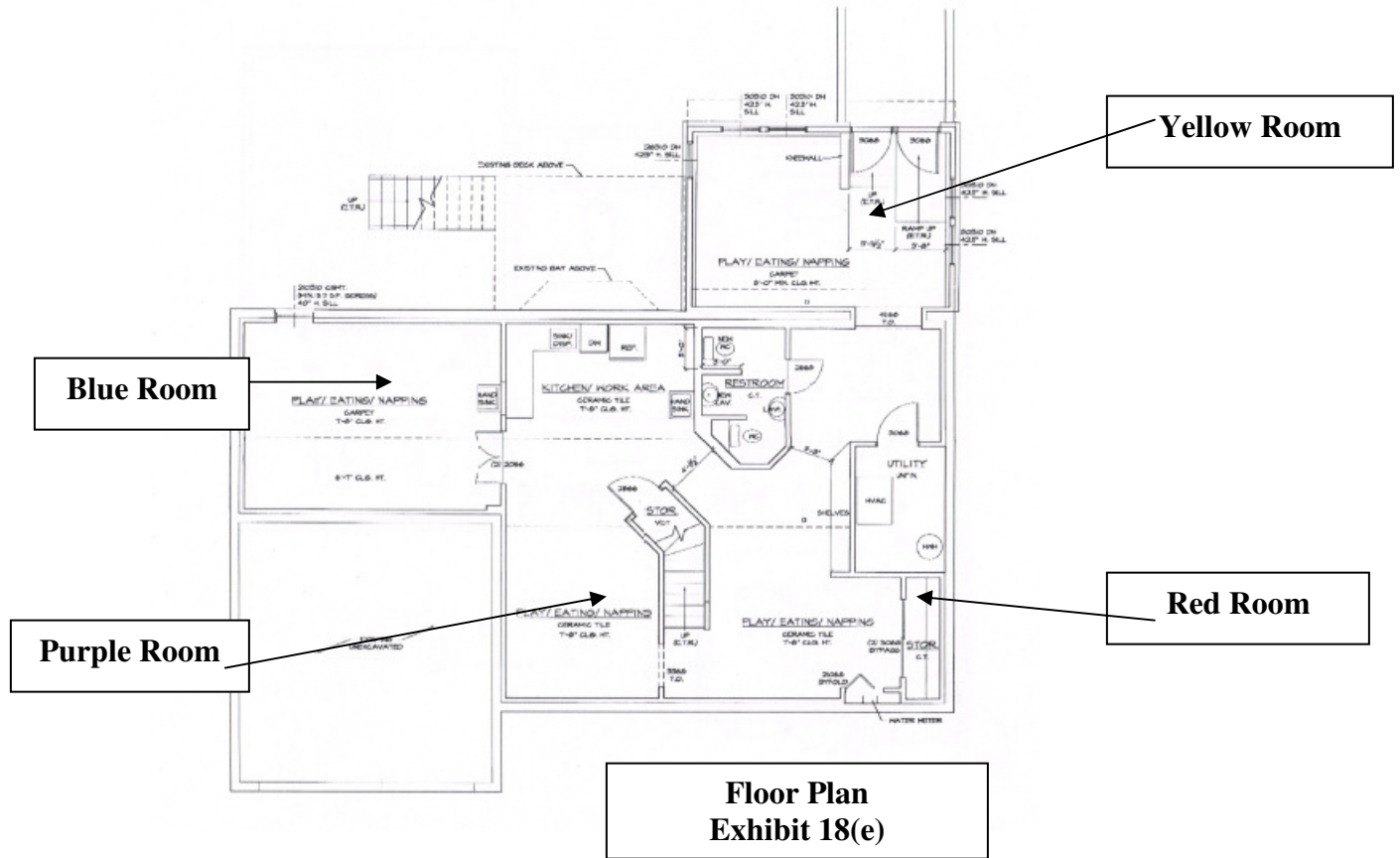
The child day care business will still be operated in the existing two-story dwelling owned by the applicant. The day care will be conducted on the lower level (walk-in basement) of the home and comprised of approximately 1,900 square feet. The proposed Site Plan (Exhibit 18(a)) is shown on the following page. The proposed Floor Plan (Exhibit 18(e)) is shown on the page 13. The different age groups enrolled in the center are assigned to different rooms, differentiated by their colors, which are also shown on the following pages. Mrs. Solano testified that the blue room is currently used for infants, preschoolers use the purple room, and

the red and yellow rooms are used for activities such as circle time, reading time, science, art and large motor coordination activities. Exhibit 8, p. 2.



**Exhibit 18(a)**  
**Site Plan**





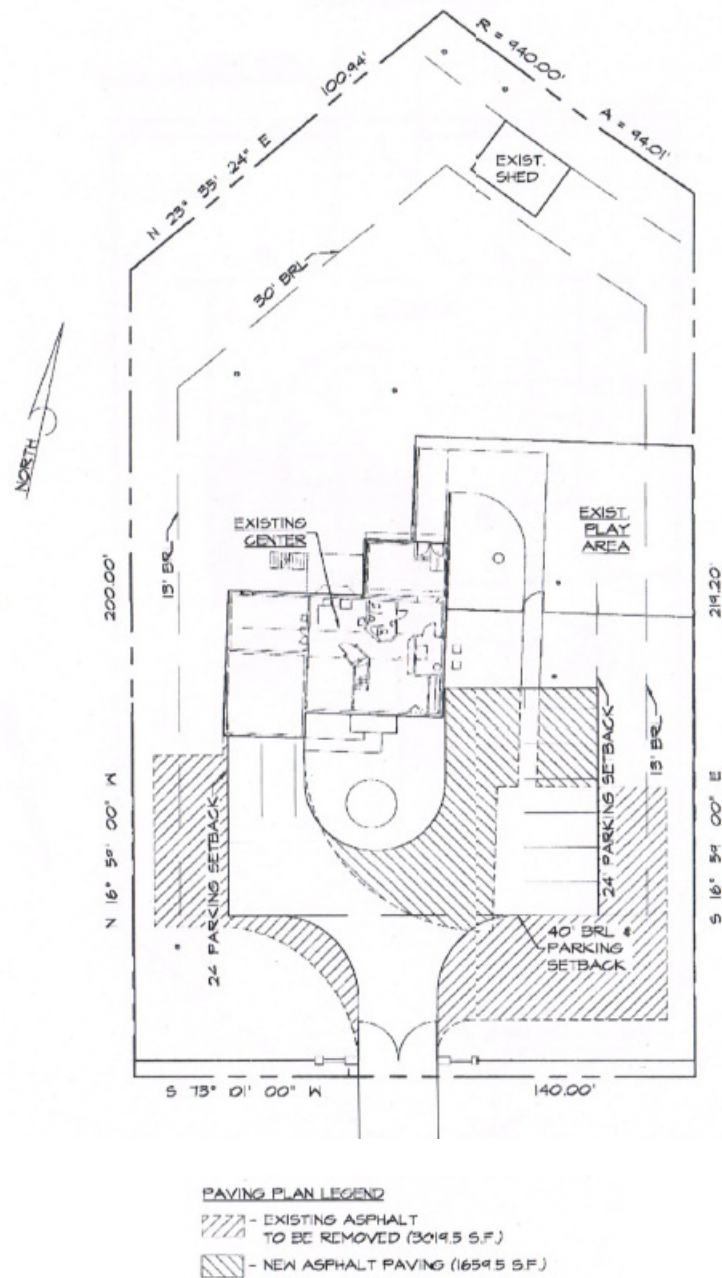
Exterior changes include removing and relocating parking areas and additional screening for the parking areas, discussed in those sections below. All of the activities associated with the business will be conducted within the home or in the rear yard. Access will be in the rear of the property and reached by an asphalt pathway located between the parking area on the eastern side of the house and the property line. Exhibit 30(a), p. 4. The outside play area for children is located in the eastern side of the rear yard and is enclosed with a four-foot wooden fence, as shown in a photograph submitted by the Petitioners (Exhibit 29(f)), below:



## 2. Parking:

In addition to Mrs. Solano and her daughter, the child care facility will have up to three full time non-resident employees and one part-time non-resident employee (who will arrive during non-peak hours). Exhibit 30(a), p. 5. The garage will be used for parking for Mrs. Solano and her daughter. The Petitioners also propose to reconfigure and remove part of the existing paved area to comply with the parking setback requirements. Approximately 3,019.5 square feet of existing asphalt will be removed and approximately 1,659.5 will then be replaced,

for a net lost of approximately 1,360 square feet. The Paving Plan for the proposed use (Exhibit 18(c)) is shown below:



The number of parking spaces required for this use is determined by Zoning Ordinance §59-E-3.7, which provides, in relevant part:



***Child day care facility.*** *For a family day care home or group day care home, one space for every non-resident staff member in addition to the residential parking requirement. The required number of spaces may be allowed on the street abutting the site. For a child day care center, one space for every non-resident staff member in addition to the residential parking requirement if applicable and adequate parking for discharge and pick up of children. In this instance, the average drop off and pick up space required is one space for every six children. Waivers and variances are allowed in accordance with the Zoning Ordinance.* [Emphasis added.]

Based on this provision, Technical Staff calculated that 11 parking spaces would be required – one (1) space for each of the three non-resident staff members (*i.e.*, 3 spaces), two (2) spaces for the resident-employees, and one space for every 6 children (*i.e.*, five spaces). Exhibit 29(a), p. 1. The Petitioners are proposing to have the two resident employees park in the garage, four employee parking spaces (on the western side of the property), and five parent parking spaces, including one accessible space along the eastern portion of the site. Exhibit 30(a), p. 8.

The parking facility will be screened by wooden fencing along portions of the eastern, western and southern property lines (discussed in the next section) and the r proposes to plant grass between the eastern parking area and property line, as shown in the Landscape Plan reproduced in the next section.

Technical Staff found that the parking proposed is sufficient for clients, employees and residents of the Solano's home. Exhibit 30(a), p. 14.

### 3. Landscaping, Lighting and Signage:

The Landscape Plan initially submitted with the petition is shown on the following pages. As noted, the Petitioners propose to screen the parking areas with wooden fences on the east and west property boundaries. They will also have to remove one existing 10" maple tree and plant two new red maples to shade the parking area. Petitioners propose to plant a 3-foot high hedge along the southern property line (bordering Darnestown Road). Exhibit 18(b).

At the public hearing, the Petitioners agreed to plant five Leyland Cypress trees along the northeast property line to address Mr. and Mrs. Oxley's concerns relating to screening, stormwater, and noise from the proposed use. A detail of the Landscape Plan (Exhibit 18(b)) showing the location of the Leyland Cypress trees (added during the public hearing) is shown on page 18 of this Opinion:

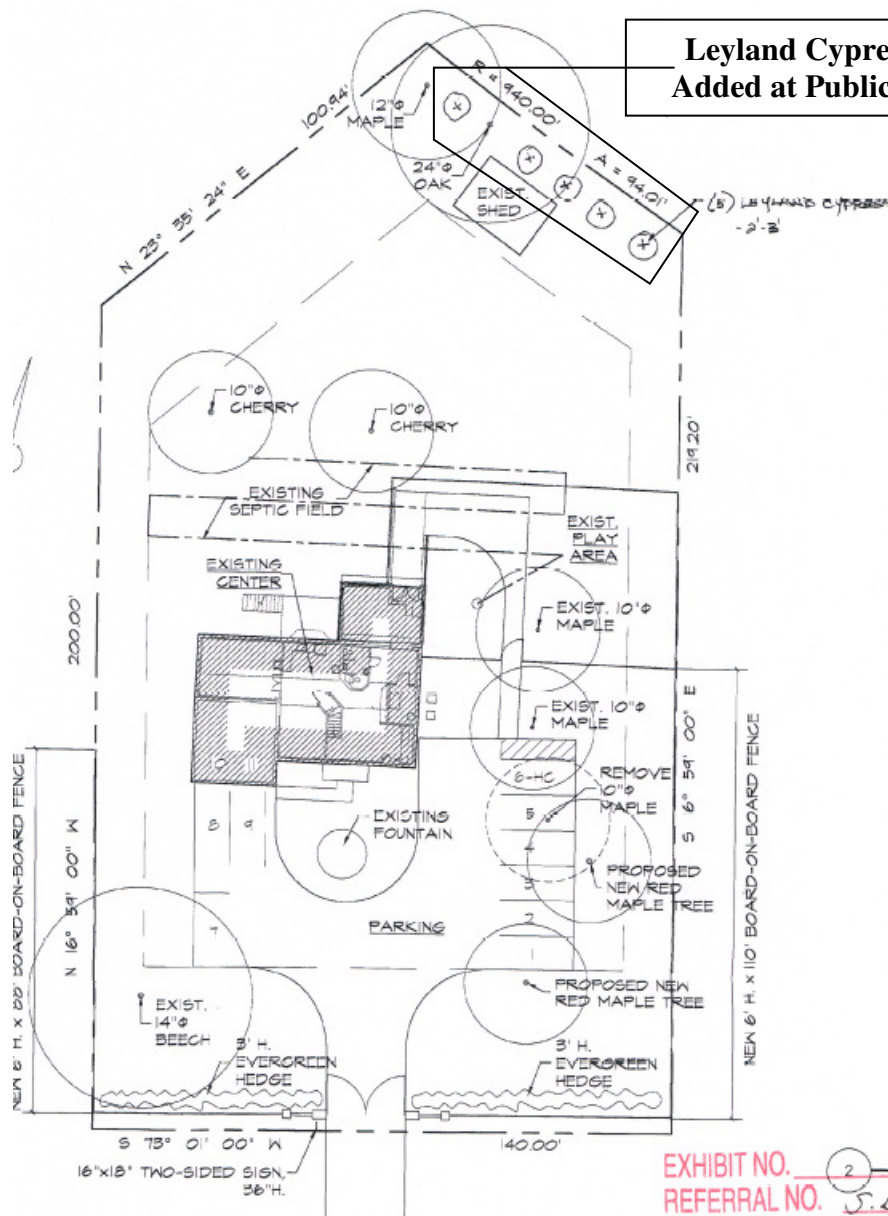


EXHIBIT NO. 2  
REFERRAL NO. 5.2

**Notes From Landscape Plan  
Exhibit 18(b)**

## LANDSCAPING

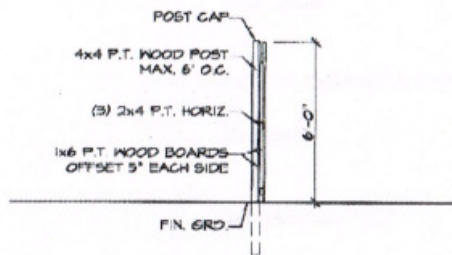
ADDITIONAL TREE PLANTING WILL BE UNDERTAKEN AS RECOMMENDED BY THE FORESTER. THE SUBJECT PROPERTY IS SURROUNDED BY CONIFEROUS TREES. THE EASTERN PROPERTY LINE IS DENSELY ENCLOSED WITH 40'+ H. PINE TREES. THE NORTHERN LOT LINE IS ENCLOSED WITH 75'+ CONIFEROUS TREES. THE WESTERN PROPERTY LINE IS DENSELY ENCLOSED WITH 40'+ LEYLAND CYPRESS TREES. A PORTION OF THE SOUTHERN LOT LINE IS COVERED WITH 40'+ PINE TREES. NONE OF THE SUBJECT TREES ARE ON THE CHILD CARE CENTER PROPERTY.

ONE 10"Ø MAPLE TREE IS PROPOSED TO BE REMOVED TO PROVIDE FOR PARKING. TWO NEW RED MAPLE TREES ARE PROPOSED TO BE PLANTED ADJACENT TO THE PARKING AREA TO PROVIDE SHADE TO THE PARKING AREA. THE BALANCE OF THE EXISTING LANDSCAPING AND TREES ARE TO REMAIN. THE LANDSCAPING IS NEATLY MAINTAINED.

NEW 3' H. EVERGREEN HEDGE IS PROPOSED ALONG THE STREET RIGHT-OF-WAY AS NOTED ON THE PLAN.

A 6' H. BOARD-ON-BOARD TYPE WOOD FENCE IS PROPOSED ALONG BOTH SIDE LOT LINES SCREENING THE PROPOSED PARKING AREA.

THE PROPOSED PAVED PARKING AREA AND DRIVE IS 3677 S.F. THE EXISTING AND PROPOSED LANDSCAPING WILL SHADE MINIMUM 30% (103 S.F.) OF PARKING AREA AND DRIVE.



**PROPOSED  
SCREENING FENCE DETAIL**

SCALE: 1/4" = 1'-0"



**PROPOSED  
SCREENING HEDGE DETAIL**

SCALE: 1/4" = 1'-0"

**Landscape Plan Details  
Exhibit 18(b)**

Technical Staff discussed landscaping and screening in their report (Exhibit 28, p. 6):

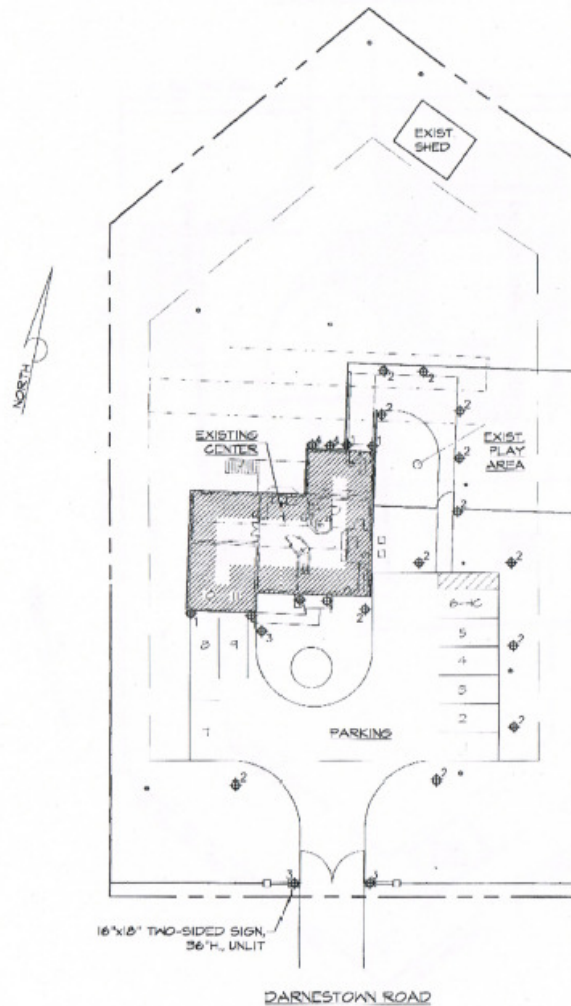
The property is surrounded by coniferous trees. The southern and eastern property lines have pine trees, the northern property line contains coniferous trees, and the western property line contains Leyland cypress trees. The backyard is surrounded by a six foot tall board-on-board fence. The applicants propose to add a six foot tall board-on-board fence from the property line closest to the road to the end of the parking areas on the western and eastern property lines. Along the street right-of-way, the screening is a white wooden fence and the applicants propose to plant a three foot high evergreen hedge blocking the view of the parking lot from Darnestown Road.

Exhibit 30(a), p. 20. Mr. and Mrs. Oxley testified that she and her husband own the fence and a portion of the coniferous trees along the property boundaries referenced in the Technical Staff Report. T. 56, 60. Technical Staff advises that there are no forest conservation issues in this case. Exhibit 30(a), p. 8.

Initially, Petitioners proposed placing a sign, shown in the original Technical Staff Report (Exhibit 30(a)) shown below, advertising the child care facility along Darnestown Road. After Technical Staff found the sign to be incompatible with the surrounding area, Petitioners withdrew their request for a sign and no sign is included with this petition. T. 7.



Petitioners submitted a Lighting Plan (below, Exhibit 18(d)), showing the proposed lighting for the child care facility:



### SITE ILLUMINATION

THE EXISTING EXTERIOR ILLUMINATION CONSISTS OF RESIDENTIAL STYLE LIGHT FIXTURES MOUNTED ON THE BRICK PEDIMENTS AT THE DRIVEWAY ENTRANCE, FRONT AND REAR ENTRANCE DOORWAYS, GARAGE ENTRANCE, AND REAR DECK.

ONE POLE MOUNTED LIGHT, APPROXIMATELY 6' TALL, IS LOCATED IN THE FRONT YARD ADJACENT TO THE FRONT WALK.

THERE ARE APPROXIMATELY SIXTEEN (16) LANDSCAPE LIGHTS AROUND THE PARKING LOT, ALONG THE CHILD CENTER ENTRANCE WALKWAY, AND IN THE CHILD CENTER PLAY AREA. THESE LANDSCAPE LIGHTS ARE APPROXIMATELY 18" H. TSW INCANDESCENT FIXTURES. EXISTING LANDSCAPE LIGHTS WILL BE RELOCATED AS SHOWN ON THE SITE LIGHTING PLAN.

SITE ILLUMINATION IS DESIGNED SUCH THAT NO LIGHT WILL BLEED ONTO ADJACENT HOMEOWNER'S PROPERTY.

#### ELECTRICAL FIXTURE LEGEND

- ⊕ - BUILDING MOUNTED SCORCE LIGHT - TSW
- ⊕ - LANDSCAPE LIGHT - 18" H. TSW
- ⊕ - MIDPOST MOUNTED COACH LIGHT - TSW
- ⊕ - RECESSED LIGHT - TSW



According to Technical Staff, the Petitioners propose a total of 16 landscape lights (75 watts) at approximately 18 inches high around the parking area, the entrance walkway, and the play area. Exhibit 30(a), p. 9. There are six building-mounted sconce lights (75 watts) on the front and back of the residence. In addition, there are three pier/post mounted coach lights (also 75 watts) on the brick gate and on a pole in the front yard. There are two spotlights on the front entryway walls, and two recessed lights on the rear of the house. Staff reports that these lights do not cause glare into adjoining property. Photographs of the landscape lights and the pier/post mounted coach lights from the Technical Staff Report (Exhibit 30(a), p. 9) are shown below:



**Landscape  
Lights**



**Post-Mounted Lights**

#### 4. Operations:

Petitioners' proposal for conducting the child day care center is set forth in their Statement of Operations (Exhibit 8).

##### a. Staffing:

The proposed child day care center will have a total of five full time employees. Two of these employees (Mrs. Solano and her daughter, Jenny Solano) reside at the daycare facility and



will not make any trips during the AM or PM peak hour periods. There will be, at most, three non-resident, full-time employees, and one non-resident, part-time employee. The latter will arrive and depart during off-peak hours. The Petitioners propose to stagger the arrival and departure time of employees, as set forth in the following chart, attached as an exhibit to their Statement of Operations:

<b>Arrival and Departure Time for Staff - Proposed</b>					
TIME	STAFF	IN	OUT	TOTAL IN & OUT	TOTAL TRIPS
6:30 AM					
7:00 AM	1	1		1	
7:30 AM	1	1		1	
8:00 AM					
8:30 AM					
9:00 AM	1	1		1	
9:30 AM					
10:00 AM	1	1		1	4 TRIPS
3:00 PM					
3:30 PM	1		1	1	
4:00 PM					
4:30 PM					
5:00 PM	1		1	1	
5:30 PM	1		1	1	
6:00 PM					
6:30 PM	1		1	1	4 TRIPS

**Exhibit 12**  
**Arrival and Departure Time**  
**For Staff -- Proposed**

The maximum staff is set forth as a condition in Part IV of this Opinion and Decision.

*b. Hours of Operation:*

The center's hours of operation hours are from 6:30 AM to 6:30 PM, Monday through Friday. These hours are also spelled out in a condition in the final part of this Opinion. The Statement of Operations (Exhibit 8, p. 2) indicates that the center will be closed on most Federal

holidays. Children will be dropped off between 6:30 a.m. and 10:00 a.m. and be picked up between the hours of 2:30 p.m. and 6:30 p.m.

*c. Drop-off and Pick-up of Children:*

Mrs.Solano testified that parent arrival times are staggered in one-half hour increments between 6:30 a.m. and 9:30 a.m. in the morning and 4:00 p.m. to 6:30 p.m. in the evening. Because her State license does not permit her to keep children after 6:30 p.m., she makes sure that they have been picked up by that time. Approximately 20% come during the non-peak hour and several parents have two children at the center and several on the waiting list. She will not accept new children if their parents cannot accommodate the staggered times. T. 33-35. The proposed drop-off and arrival times are included in a chart attached to the Petitioners' Statement of Operations, shown on the following page.

<b>Arrival and Departure Time for Families and Children - Proposed</b>						
TIME	FAMILIES	CHILDREN	IN	OUT	TOTAL IN & OUT	TOTAL TRIPS
6:30 AM	2	4	2	2	4	
7:00 AM	2	4	2	2	4	
7:30 AM	2	3	2	2	4	
8:00 AM	3	4	3	3	6	
8:30 AM	2	4	2	2	4	
9:00 AM	3	3	3	3	6	
9:30 AM	1	2	1		1	29 trips
9:45 AM	3	4	2	3	5	
10:00 AM	2	2	2	2	2	
2:30 PM	3	4	3	3	6	
3:00 PM	3	4	3	3	6	
3:30 PM	2	4	2	2	4	
4:00 PM	3	4	3	3	6	
4:30 PM	2	4	2	2	4	
5:00 PM	2	3	2	2	4	
5:30 PM	2	3	2	2	4	
6:00 PM	2	3	1	1	2	
6:30 PM	1	1	1	1	2	22 trips

EXHIBIT

**Exhibit 11**  
**Arrival and Departure Time for Families**  
**and Children--Proposed**

d. Outdoor Activities:

Petitioners' Statement of Operations describes the proposed outdoor activities, which will take place in the existing play area on the eastern side of the property. The Petitioners describe the area as approximately 1,000 square feet; Technical Staff reports the size as 990 square feet. It is fenced on all sides with a four-foot high wood fence. A picture of the play area is set forth on Page 13 of this Opinion and Order and no changes to the play area are proposed.

Petitioners propose to stagger play times to minimize noise from the children. Petitioners state that no more than fifteen (15) children at one time shall be outside in the play area and outdoor playtimes will be limited to the hours between 10:00 a.m. and 11:30 a.m. and 3:30 p.m. and 4:30 p.m., weather permitting. At all other times, the children will be engaged in planned learning activities indoors. Exhibit 8.

**D. Master Plan**

The subject property is located within the geographic area covered by the *2002 Potomac Subregion Master Plan* (Master Plan). Exhibit 17. There is no site-specific reference to the subject property in the Master Plan, but the Plan does contain general recommendations regarding special exceptions (Exhibit 17, pp. 35-36):

This Plan endorses guidelines for locating special exception uses in residential areas ...The Master Plan seeks to provide guidelines that will protect residential areas while also attempting to meet important policy goals.

Recommendations:

- Limit the impacts of existing special exceptions in established neighborhoods. Increase the scrutiny in reviewing special exception applications for highly visible sites and properties adjacent to the Chesapeake & Ohio Canal National Historical Park.
- Avoid an excessive concentration of special exceptions along major transportation corridors.

Sites along these corridors are more vulnerable to over-concentration because they have high visibility. Uses that might diminish safety or reduce capacity of roadways with too many access points or conflicting turn movements should be discouraged.

- Protect the Chesapeake & Ohio Canal National Historical Park, major transportation corridors and residential communities from incompatible design of special exception uses.

In the design and review of special exception uses, the following guidelines should be followed in addition to those stated for special exception uses in the Zoning Ordinance:

- a. Adhere to Zoning Ordinance requirements to examine compatibility with the architecture of the adjoining neighborhood...
- b. Parking should be located and landscaped to minimize commercial appearance...
- c. Efforts should be made to enhance or augment screening and buffering as viewed from abutting residential areas and major roadways.

Exhibit 17, pp. 35-36. Technical Staff concluded that the application met these guidelines because the property will retain its residential appearance due to the screening proposed for the parking areas. They also advised that there were four special exceptions in the area, but they didn't consider that to be a high concentration of these uses. Exhibit 30(a), p. 7.

### **E. Public Facilities and Site Circulation**

#### **a. Traffic:**

Technical Staff reports that the proposed use will generate 26 new trips, thus Local Area Transportation Review (LATR) is not required. The subject property is located in the Rural Policy Area, which has no mitigation required for Policy Area Mobility Review (PAMR). Exhibit 34.

Technical Staff found that site circulation and access were safe and adequate:

According to 2010 turning movement count data collected at the Darnestown Road/Seneca Road intersection by the Traffic Group for the Darnestown ES traffic study, 927 vehicles travel towards Gaithersburg (eastbound) and 341 vehicles travel towards Poolesville (westbound) during the morning peak-hour. Based on a staff of 5, the day care is estimated to generate approximately 26 total trips during weekday morning and evening peak-hours. It should be noted that approximately 70% of the above site traffic is typically pass-by or diverted trips, which are already on Darnestown Road or adjacent streets. Based on the existing traffic pattern, during the morning peak-hour, approximately 75% of the inbound traffic (10 vehicles) is expected to turn left into the site and approximately 75% of the outbound traffic (9 vehicles) is expected to turn left out of the driveway. Since the eastbound inbound left turn traffic will be turning into the site against off-peak direction traffic, these vehicles are anticipated to be able to turn into the site without any delay. Similarly, given the low amount of westbound off-peak direction traffic, the westbound traffic exiting the site is not anticipated to experience any delay while turning right. The traffic exiting the site and turning left will queue on site until an adequate gap is observed in the eastbound traffic stream and will not [affect] traffic operations along Darnestown Road.

It is noted that posted travel speed along Darnestown Road in this area is 30 miles per hour. Additionally, there are speed cameras along Darnestown Road in the vicinity of the site, before traffic approaches Seneca Road traveling towards Gaithersburg and again after Turkey Foot Road.

The circulation for the interior parking area works as the driveway aisle meet the required 20 feet.

Two individuals raised traffic concerns relating to the use. Mrs. Sylvia Trunnell testified that her driveway access is directly onto Route 28 near Turkey Foot Road. According to her, rush hour begins at 6:30 a.m. Route 28 is a major commuting route for people in upper Montgomery County, and rush hour continues until about 9:00 a.m. Traffic starts again around 2:30 or 3:00 p.m. when school buses begin dropping children off and continues until 7:00 p.m. at night. She has difficulty getting in and out of her driveway. T. 62. She stated that a stoplight into the commercial shopping center is located a couple of houses north from Mrs. Solano's house, which causes queuing to occur. According to Mrs. Trunnell, she and her husband are "essentially prisoners" during rush hour because they can't get in or out during those hours. T. 62-63. Mr. David Bivans submitted a letter in advance of the hearing raising concerns regarding increased risk of accidents because Darnestown

Road at that location is a single lane with a bike path. Mr. Bivans is concerned because he believes the increased enrollment will cause people to try to pass on the right while crossing the solid white line. Exhibit 28.

*b. Septic System:*

Mr. Bivans expressed concern that the septic system on the property was not sufficiently sized for the increased enrollment. Exhibit 28. In response, the Petitioners submitted that the system had been pumped in 2008, with a recommendation that it be pumped again in two years to determine capacity. Exhibit 15. A receipt from a septic service, H&R Environmental, LLC, dated October 22, 2011, indicates that the second pumping was performed. Exhibit 16. Attached to the Technical Staff Report is a memorandum confirming that the existing system will handle the proposed enrollment. Exhibit 30(a), Attachment F.

**F. Community Reaction**

The application was opposed by two adjoining neighbors, Mr. and Mrs. Oxley, and two individuals who live in the area, Mrs. Sylvia Trunnell, and Mr. David Bivans. There concerns are set forth specifically in the different sections of this Opinion and Decision, but will briefly be summarized here. The raised concerns about traffic, especially regarding the ability to enter and exit the subject property during peak hours, the noise and visual screening of the use, and whether the septic system was properly sized for the increased number of children. T. 55-56, 59-61, 62-63; Exhibit 28.

**III. SUMMARY OF TESTIMONY**

Testimony presented at the public hearing is set forth herein as relevant. A complete summary of testimony is contained in the Appendix attached hereto and incorporated herein.



#### **IV. FINDINGS AND CONCLUSIONS**

A special exception is a zoning device that authorizes certain uses provided that pre-set legislative standards are met, that the use conforms to the applicable master plan, and that it is compatible with the existing neighborhood. Each special exception petition is evaluated in a site-specific context because a given special exception might be appropriate in some locations but not in others. The zoning ordinance establishes both general and specific standards for special exceptions, and the Petitioner has the burden of proof to show that the proposed use satisfies all applicable general and specific standards. Technical Staff and the Planning Board concluded that Petitioners will have satisfied all the requirements to obtain the special exception, if they comply with the recommended conditions (Exhibits 28 and 34), and the Petitioners have withdrawn their request for a sign along Darnestown Road.

Weighing all the testimony and evidence of record under a “preponderance of the evidence” standard (Zoning Ordinance §59-G-1.21(a)), the Hearing Examiner concludes that the instant petition meets the general and specific requirements for the proposed use, as long as the Petitioners comply with the conditions set forth in Part IV, below.

##### **A. Standard for Evaluation**

The standard for evaluation prescribed in Code § 59-G-1.2.1 requires consideration of the inherent and non-inherent adverse effects on nearby properties and the general neighborhood from the proposed use at the proposed location. Inherent adverse effects are “the physical and operational characteristics necessarily associated with the particular use, regardless of its physical size or scale of operations.” Code § 59-G-1.2.1. This provision specifies, “Inherent adverse effects alone are not a sufficient basis for denial of a special exception.” Non-inherent adverse effects are “physical and operational characteristics not necessarily associated with the

particular use, or adverse effects created by unusual characteristics of the site.” *Id.* Non-inherent adverse effects, alone or in conjunction with inherent effects, are a sufficient basis to deny a special exception.

Technical Staff have identified seven characteristics to consider in analyzing inherent and non-inherent effects: size, scale, scope, light, noise, traffic and environment. For the instant case, analysis of inherent and non-inherent adverse effects must establish what physical and operational characteristics are necessarily associated with a “child day care center” use. Characteristics of the “Little Footprints Early Care and Initial Education Center” that are consistent with the “necessarily associated” characteristics of child day care center uses will be considered inherent adverse effects, while those characteristics of the proposed use that are not necessarily associated with child day care center uses, or that are created by unusual site conditions, will be considered non-inherent effects. The inherent and non-inherent effects thus identified must then be analyzed, in the context of the subject property and the general neighborhood, to determine whether these effects are acceptable or would create adverse impacts sufficient to result in denial.

Technical Staff identified the following inherent characteristics of a child day care center (Exhibit 28, p. 7):

- (1) vehicular trips to and from the site;
- (2) outdoor play areas;
- (3) noise generated by children;
- (4) drop-off and pick-up areas; and
- (5) lighting.

To this list, the Hearing Examiner would add the need for sufficient parking spaces on site, in accordance with Zoning Ordinance §59-E-3.7, and screening of the parking area.

Technical Staff concluded that there are no non-inherent effects of the use. As stated by Staff,

The child care use in this application is approximately 1,900 square feet and is located in the basement of the existing two-story single-family dwelling. There are no significant traffic impacts that would result from the proposed special exception. Staff finds that adequate parking would be available for parents and employees under the special exception proposal. Existing lighting on the property is adequate and consistent with the residential character of the neighborhood and no new lighting will be added. There will be no changes to the existing dwelling, or play area. The front, side, and rear yards are landscaped with mature trees on the applicants' property. There are no unusual non-inherent characteristics of the site. Staff finds that there are no non-inherent adverse effects arising from the child daycare sufficient to form a basis for denial.

Exhibit 30(a), p. 10.

The neighbors raised a number of issues – noise, traffic volume and safety, screening, and the capacity of the septic system, all of which have been discussed previously. There is no evidence in this record that there are any unusual site conditions. While Mrs. Trunnell and Mr. Bivans raised generalized concerns about the safety of access and egress into the property, Technical Staff did provide a more detailed analysis, along with photographs, indicating that on-site circulation and access/egress to the site were safe and adequate. Similarly, Mr. Oxley testified that he heard noise from the site, but did not quantify the volume in relation to other daycare uses, which normally have noise from children playing outside, except to say that he can hear the noise during the day.

The Hearing Examiner finds that the relevant site and operational characteristics of the proposed use are consistent with the inherent characteristics identified for a child day care center. The building is not of an unusual size or design for the neighborhood, but rather is an existing one-family residence in a residential area; the outdoor play area is enclosed by a fence, the parking area provides sufficient spaces for both employees and parents, and will be screened to

preserve the residential character of the use. In addition, lighting is residential in style and will not be increased for this special exception; the amount of traffic generated would not be unusual (or even sufficient to generate a traffic study under the LATR); and operations at the day care center, from a land use perspective, will be consistent with the typical operations of such a facility.

### **B. Specific Standards**

The specific standards for Child Day Care Facilities are found in Code § 59-G-2.13.1. The record in this case provides adequate evidence that the specific standards would be satisfied, as outlined below.

#### **Sec. 59-G-2.13.1. Child day care facility.**

- (a) *The Hearing Examiner may approve a child day care facility for a maximum of 30 children if:*
- (1) *a plan is submitted showing the location of all buildings and structures, parking spaces, driveways, loading and unloading areas, play areas, and other uses on the site;*

Conclusion: The submitted Site Plan (Exhibit 18(a)) and revised Landscape and Lighting Plan (Exhibits 18(b) and 18(d), respectively) satisfy this requirement.

- (2) *parking is provided in accordance with the parking regulations of article 59-E. The number of parking spaces may be reduced by the Hearing Examiner if the applicant demonstrates that the full number of spaces required in section 59-E-3.7 is not necessary because:*
- (A) *existing parking spaces are available on adjacent property or on the street abutting the site that will satisfy the number of spaces required;*  
*or*
- (B) *a reduced number of spaces would be sufficient to accommodate the proposed use without adversely affecting the surrounding area or creating safety problems;*

Conclusion: The number of parking spaces required for this use is determined by Zoning Ordinance §59-E-3.7, which provides, in relevant part:

***Child day care facility. . . . For a child day care center, one space for every non-resident staff member in addition to the residential parking requirement if applicable and adequate parking for discharge and pick up of children. In this instance, the average drop off and pick up space required is one space for every six children.*** *Waivers and variances are allowed in accordance with the Zoning Ordinance.* [Emphasis added.]

Technical Staff found the available parking to be sufficient and it meets the requirements set forth above. Exhibits 30(a), 29(a), p. 1. The Hearing Examiner finds that the on-site parking is adequate and meets the statutory standard.

(3) *an adequate area for the discharge and pick up of children is provided;*

Conclusion: Technical Staff found that there are adequate spaces for parent pick-up and drop-off, which includes four spaces with an additional handicapped space. Exhibits 29(a), 30(a). In addition, Staff concluded that site circulation was adequate because the driveway is wide enough to permit two-way traffic so cars may exit and enter the property at the same time. Exhibit 34. For the reasons, the Hearing Examiner finds that the petition meets this standard.

(4) *the petitioner submits an affidavit that the petitioner will:*

- (A) *comply with all applicable State and County requirements;*
- (B) *correct any deficiencies found in any government inspection; and*
- (C) *be bound by the affidavit as condition of approval for this special exception; and*

Conclusion: The required affidavit has been submitted (Exhibit 6).

(5) *the use is compatible with surrounding uses and will not result in a nuisance because of traffic, parking, noise or type of physical activity. The hearing examiner may require landscaping and screening and the submission of a plan showing the location, height, caliper, species, and other characteristics, in order to provide a physical and aesthetic barrier to protect surroundings properties from any adverse impacts resulting from the use.*

Conclusion: The Hearing Examiner agrees with the Planning Board and Technical Staff that, with the elimination of the proposed sign, the use will be compatible with the neighborhood. The child care facility will be conducted in an existing residence, and the operational impacts of

the use are those which are inherent in child day care facilities. The use already exists in the residence as a matter of right in the R-200 Zone, and the effects of its expansion will be limited by conditions which specify hours of operation during normal weekday work hours; limit the number of children permitted to play outdoors at any one time; outdoors; and require additional fencing and landscaping.

Moreover, the weight of the evidence in this case supports a finding that the use will not have an adverse impact on existing traffic conditions. Based on these factors, the Hearing Examiner finds that, with the recommended conditions set forth in Part IV of this Opinion and Decision, the use will be compatible with surrounding uses and will not result in nuisance because of traffic, parking, noise or any type of physical activity.

- (b) *A child day care facility for 31 or more children may be approved by the Board of Appeals subject to the regulations in subsection (a) above, and the following additional requirements: . . .*

Conclusion: Not applicable.

- (c) *The requirements of section 59-G-2.13.1 do not apply to a child day care facility operated by a nonprofit organization and located in: . . .*

Conclusion: Not applicable.

### **C. General Standards**

The general standards for a special exception are found in Code § 59-G-1.21(a). The record in this case provides ample evidence that the general standards would be satisfied, as outlined below.

#### **Sec. 59-G-1.21. General conditions.**

- §5-G-1.21(a)** *-A special exception may be granted when the Board, the Hearing Examiner, or the District Council, as the case may be, finds from a preponderance of the evidence of record that the proposed use:*
- (1) *Is a permissible special exception in the zone.*



Conclusion: A group day care home use is a permissible special exception in the R-200 Zone, pursuant to Code § 59-C-1.31(d).

- (2) *Complies with the standards and requirements set forth for the use in Division 59-G-2. The fact that a proposed use complies with all specific standards and requirements to grant a special exception does not create a presumption that the use is compatible with nearby properties and, in itself, is not sufficient to require a special exception to be granted.*

Conclusion: The proposed use complies with the specific standards set forth in § 59-G-2.13.1 for a Child Day Care Facility use discussed above.

- (3) *Will be consistent with the general plan for the physical development of the District, including any master plan adopted by the Commission. Any decision to grant or deny special exception must be consistent with any recommendation in a master plan regarding the appropriateness of a special exception at a particular location. If the Planning Board or the Board's technical staff in its report on a special exception concludes that granting a particular special exception at a particular location would be inconsistent with the land use objectives of the applicable master plan, a decision to grant the special exception must include specific findings as to master plan consistency.*

Conclusion: The subject site is within the 2002 *Potomac Subregion Master Plan*. The Hearing Examiner finds that the proposed use is consistent with the objectives and recommendations of the Potomac Subregion Master Plan. The Master Plan set forth several guidelines for special exception uses. One guideline was to avoid concentration of special exception uses along major highways to reduce the number of access points along the roads. Technical Staff reports that there are only four other special exceptions in the surrounding area, which is relatively large. In addition, the facility will not need an additional access point because access is provided by an existing driveway. The Master Plan also calls for limiting the impacts of special exceptions in existing neighborhoods. Given that the proposed use will be operated primarily in the basement of the dwelling, that arrival/departure times of staff and parents will be staggered, that outdoor

time is limited, and that additional screening to buffer any noise is being provided, the Hearing Examiner believes that this guideline has adequately been addressed. With regard to parking, the existing amount of paved area will be reduced, and the required setbacks and screening will be provided. The Darnestown Road frontage will be improved by a landscaped hedge. As a result, the Hearing Examiner finds that the use will not adversely impact the residential character of the area.

*(4) Will be in harmony with the general character of the neighborhood considering population density, design, scale and bulk of any proposed new structures, intensity and character of activity, traffic and parking conditions, and number of similar uses.*<sup>3</sup>

Conclusion: The proposed group day care home will be in harmony with the general residential character of the neighborhood because it will be housed in an existing single-family home, and there will be no external changes to that structure itself. The rear yard play area is completely fenced in. Both Technical Staff and the Planning Board found that the additional traffic created by the proposed expansion of the use will not create traffic volume or safety problems. The parking is adequate, and can handle the pick-up and drop-off of children. Technical Staff advises that there are few special exception uses in the surrounding area. Based on this evidence, the Hearing Examiner finds that this standard has been met.

*(5) Will not be detrimental to the use, peaceful enjoyment, economic value or development of surrounding properties or the general neighborhood at the subject site, irrespective of any adverse effects the use might have if established elsewhere in the zone.*

Conclusion: The Hearing Examiner concludes that the proposed use will not be detrimental to the peaceful enjoyment, economic value or development of surrounding properties at the site. As noted above, the proposed use will have only inherent effects on the general neighborhood and

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<sup>3</sup> This section was amended, as set forth here, by Zoning Text Amendment 10-13 (Ord. No. 17-01, effective 2/28/11).

that screening, landscaping, and the conditions imposed will mitigate any adverse impacts.

- (6) *Will cause no objectionable noise, vibrations, fumes, odors, dust, illumination, glare, or physical activity at the subject site, irrespective of any adverse effects the use might have if established elsewhere in the zone.*

Conclusion: Based on the nature of the use, it will not cause objectionable vibrations, fumes, odors and dust. As discussed earlier in this Opinion, the special exception, as conditioned, will cause only such noise and physical activity as is inherent in this type of use, wherever it might be located in this zone. Most of the exterior lighting consists of 75-watt fixtures. No new lighting will be added, and operations cease at 6:30 p.m. The Hearing Examiner therefore finds, as did Technical Staff, that there will not be objectionable noise, vibrations, fumes, odors, dust, illumination, glare, or physical activity at the site as a result of the special exception.

- (7) *Will not, when evaluated in conjunction with existing and approved special exceptions in any neighboring one-family residential area, increase the number, intensity, or scope of special exception uses sufficiently to affect the area adversely or alter the predominantly residential nature of the area. Special exception uses that are consistent with the recommendations of a master or sector plan do not alter the nature of an area.*

Conclusion: Technical Staff reports that there are only four other special exceptions in the neighborhood and found that this standard has been met. Exhibit 30(a). Having no evidence to the contrary, the Hearing Examiner finds that the child day care center proposed in this case will not increase the number, scope, or intensity of special exception uses sufficiently to affect the area adversely or alter the nature of the area.

- (8) *Will not adversely affect the health, safety, security, morals or general welfare of residents, visitors or workers in the area at the subject site, irrespective of any adverse effects the use might have if established elsewhere in the zone.*

Conclusion: The evidence supports the conclusion that the proposed group day care home will not be a danger to public health, safety, security, morals or general welfare of residents, visitors

or workers in the area at the subject site. While individuals opposing the application expressed generalized concerns regarding traffic along Darnestown Road, Technical Staff provided more detailed, expert evidence that the access would be safe and adequate. For these reasons, the Hearing Examiner finds that this standard will be met.

- (9) *Will be served by adequate public services and facilities including schools, police and fire protection, water, sanitary sewer, public roads, storm drainage and other public facilities.*

Conclusion: In a pre-hearing letter to the Hearing Examiner, Mr. Bivans questioned the capacity of the septic system to handle the increased enrollment. That capacity was reviewed and confirmed by environmental staff as part of this application; Technical Staff advises that the facility will have no impact on schools, police and fire protection, water and sewer, public roads, storm drainage, or other public facilities. Therefore, the Hearing Examiner finds that this standard has been met.

- (A) *If the special exception use requires approval of a preliminary plan of subdivision, the Planning Board must determine the adequacy of public facilities in its subdivision review. In that case, approval of a preliminary plan of subdivision must be a condition of granting the special exception.*
- (B) *If the special exception:*
- (i) *does not require approval of a new preliminary plan of subdivision; and*
  - (ii) *the determination of adequate public facilities for the site is not currently valid for an impact that is the same as or greater than the special exception's impact;*
- then the Board of Appeals or the Hearing Examiner must determine the adequacy of public facilities when it considers the special exception application. The Board of Appeals or the Hearing Examiner must consider whether the available public facilities and services will be adequate to serve the proposed development under the Growth Policy standards in effect when the application was submitted.*

Conclusion: The special exception sought in this case would not require approval of a preliminary plan of subdivision and there is no currently valid determination of the adequacy of

public facilities for the site, taking into account the impact of the proposed special exception. Therefore, the Hearing Examiner must consider whether the available public facilities and services will be adequate to serve the proposed development under the applicable Growth Policy standards. These standards include Local Area Transportation Review (LATR) and Policy Area Mobility Review (PAMR). Transportation Planning Staff did do such a review, and concluded that both LATR and PAMR are satisfied. Specifically, the facility is expected to generate only 26 trips, and therefore, is not subject to LATR. In addition, there are no PAMR mitigation requirements for the policy area in which the use is located. Exhibit 34. For these reasons, the Hearing Examiner agrees with their conclusions and so finds.

(C) *With regard to public roads, the Board or the Hearing Examiner must further find that the proposed development will not reduce the safety of vehicular or pedestrian traffic.*

Conclusion: Technical Staff found that the use as proposed use will not reduce the safety of vehicular or pedestrian traffic because of the low number of new trips generated the existing volumes of traffic along Darnestown Road during the morning and evening peak hours, and the existing circulation patterns. Staff also indicated that the speed limit of 30 miles per hour along Darnestown Road, traffic cameras in the vicinity, will slow traffic surrounding the site. Exhibit 34. The Hearing Examiner agrees and finds that the proposed use will not adversely affect the safety of vehicular or pedestrian traffic.

#### **D. Additional Applicable Standards**

##### ***59-G § 1.23. General development standards***

(a) ***Development Standards.*** *Special exceptions are subject to the development standards of the applicable zone where the special exception is located, except when the standard is specified in Section G-1.23 or in Section G-2.*

Conclusion: The subject property is located in the R-200 Zone, which permits the proposed use

by special exception. Technical Staff found that the proposed use conforms to the development standards of the R-200 Zone. The following table from page 14 of the Staff Report lists the applicable standards and the existing measurements for the subject site:

<b>R-200 Development Standards</b>	<b>Required/Permitted</b>	<b>Proposed</b>	<b>Ordinance</b>
Minimum net lot area	20,000 square feet	33,117 square feet	§59- C-1.322(a)
Minimum lot width:			
- Along front building line	100 feet	140 feet	§59- C-1.322(b)
- Along front street line	25 feet	140 feet	
Yard requirements for a main building:			
Minimum setback	40 feet	84 feet	§59- C-1.323(a)
Minimum side yard			
- One side	12 feet	23 and 62 feet	§59- C-1.323(b)(1)
- Sum of both sides	25 feet	85 feet	§59- C-1.323(b)(1)
- Abutting a public street	40 feet	84 feet	§59- C-1.323(a)
Minimum rear yard	30 feet	82 feet*	§59- C-1.323(b)(2)
Maximum building:			
- Height	50 feet	36 feet in front 44 feet in rear	§59-C-1.327
- Coverage of lot	25%	13%**	§59-C-1.328
- Coverage of front yard	30%	30% **	§59-C-1.328
Off-street parking requirement			
- Home	2 parking spaces	2 parking spaces	§59-E-3.7
- Child Day Care Facility			
▪ Staff (non-resident)	1 parking space per staff person	3 parking spaces	§59-E-3.7
▪ Drop Off/Pick Up	1 parking space per 6 children	5 parking spaces	§59-E-3.7
Accessory Building setbacks			
- From street line	65 feet	214 feet	§59-C-1.326(a)(3)
- From rear lot line	7 feet	12 feet*	
- From side lot line	12 feet	39 feet	
*Measurement based on closest corner of building to the closest rear line.			
** Scaled from graphic.			

(b) ***Parking requirements.*** Special exceptions are subject to all relevant requirements of Article 59-E.

Conclusion: The number of parking spaces required for this use is determined by Zoning Ordinance §59-E-3.7. As set forth previously, the Zoning Ordinance requires eleven parking spaces for the proposed, which the Petitioners will provide. The Zoning Ordinance also requires

screening of the parking areas for special exception uses. Technical Staff advises that the Petitioners' have met these screening requirements and, based on this evidence (Exhibits 30(a), 29(a)), the Hearing Examiner finds that the proposed use does comply with the parking requirements contained in the Zoning Ordinance.

- (c) ***Minimum frontage.*** *In the following special exceptions the Board may waive the requirement for a minimum frontage at the street line if the Board finds that the facilities for ingress and egress of vehicular traffic are adequate to meet the requirements of section 59-G-1.21:*
- (1) *Rifle, pistol and skeet-shooting range, outdoor.*
  - (2) *Sand, gravel or clay pits, rock or stone quarries.*
  - (3) *Sawmill.*
  - (4) *Cemetery, animal.*
  - (5) *Public utility buildings and public utility structures, including radio and T.V. broadcasting stations and telecommunication facilities.*
  - (6) *Riding stables.*
  - (7) *Heliport and helistop.*

Conclusion: This special exception is not included in the above list. Moreover, the proposed use will not result in any change in the site's frontage, which meets required standards.

- (d) ***Forest conservation.*** *If a special exception is subject to Chapter 22A, the Board must consider the preliminary forest conservation plan required by that Chapter when approving the special exception application and must not approve a special exception that conflicts with the preliminary forest conservation plan.*

Conclusion: Technical Staff determined that this project is exempt from the forest conservation regulations and that "[n]o forest conservation issues are associated with the site." Exhibit 30(a), p. 8.

- (e) ***Water quality plan.*** *If a special exception, approved by the Board, is inconsistent with an approved preliminary water quality plan, the applicant, before engaging in any land disturbance activities, must submit and secure approval of a revised water quality plan that the Planning Board and department find is consistent with the approved special exception. Any revised water quality plan must be filed as part of an application for the next development authorization review to be considered by the Planning Board, unless the Planning Department and the department find that the required revisions can be evaluated as part of the final water quality plan review.*

Conclusion: Inapplicable. This provision applies only to sites where there will be land disturbance within a Special Protection Area, which is not the case here.

(f) **Signs.** *The display of a sign must comply with Article 59-F.*

Conclusion: The Petitioners withdrew their request for a sign at the public hearing after Technical Staff advised that the sign proposed was incompatible with the surrounding area. Exhibit 29(a), T. 7. As a result, no sign is proposed and this provision is inapplicable.

(g) **Building compatibility in residential zones.** *Any structure that is constructed, reconstructed or altered under a special exception in a residential zone must be well related to the surrounding area in its siting, landscaping, scale, bulk, height, materials, and textures, and must have a residential appearance where appropriate. Large building elevations must be divided into distinct planes by wall offsets or architectural articulation to achieve compatible scale and massing.*

Conclusion: There will be no external building modifications, so the building will maintain its residential character.

(h) **Lighting in residential zones.** *All outdoor lighting must be located, shielded, landscaped, or otherwise buffered so that no direct light intrudes into an adjacent residential property. The following lighting standards must be met unless the Board requires different standards for a recreational facility or to improve public safety:*

(1) *Luminaires must incorporate a glare and spill light control device to minimize glare and light trespass.*

(2) *Lighting levels along the side and rear lot lines must not exceed 0.1 foot candles.*

Conclusion: Technical Staff reports that no external changes to the existing lighting are proposed and “[t]here is no glare onto adjoining properties.” Exhibit 30(a), p. 9. The Hearing Examiner therefore finds that there will not be objectionable illumination or glare at the site as a result of the special exception.



Based on the testimony and evidence of record, I conclude that the child day care center use proposed by Petitioners, as conditioned below, meets the specific and general requirements for the special exception, and that the Petition should be granted, subject to the conditions set forth in Part IV of this Opinion and Decision.

#### IV. DECISION

Accordingly, based on the foregoing findings and conclusions, Petition No. S.E. 12-01 for a special exception in the R-200 Zone to operate a child day care center for up to 30 children in an existing single-family detached home, at 13904 Darnestown Road, Darnestown, Maryland, is **GRANTED** subject to the following conditions:

1. The Petitioners shall be bound by all of their testimony and exhibits of record, and by their representations identified in this Opinion and Decision.
2. In accordance with Code § 59-G-2.13.1(a)(4), the Petitioners shall be bound by the Affidavit of Compliance submitted in connection with this case, Exhibit 6, in which Petitioners certified that they will comply with and satisfy all applicable State and County requirements, correct any deficiencies found in any government inspection, and be bound by the affidavit as a condition of approval for the special exception.
3. The number of children enrolled at the center shall not exceed 30 children, ranging in age from infants to four-years old. In no event shall the number of children exceed the number authorized by State licensing authorities, and the ages of the permitted children will be determined by State licensing authorities.
4. The number of non-resident staff present at the facility at any one time may not exceed three full-time employees and one part-time employee; the number of resident staff may not exceed two full-time employees.
5. Arrival departure times for non-resident staff shall be staggered between 7:00 a.m. and 10:00 a.m. in the morning and between 3:30 p.m. and 6:30 p.m. in the evening as set forth on Exhibit 12.
6. The hours of operation will be between 6:30 a.m. and 6:30 p.m., Monday through Friday.
7. Arrival and departure times for the children shall be staggered between 6:30 a.m. and 10:00 a.m. during the morning drop-off and between 2:30 p.m. and 6:30 p.m. during the evening drop-off, as set forth on Exhibit 11.

8. No more than 15 children are permitted in the outdoor play area at any one time. Outdoor play times are limited to the hours of 10:00 a.m. and 11:30 a.m. and 3:30 p.m. and 4:30 p.m., Monday through Friday.
9. The Petitioners shall maintain the grounds, daily, in a clean condition, free of debris.
10. Petitioners must provide all the fencing and landscaping depicted on the Landscape Plan (Exhibit 18(b)); trees to be planted shall be no less than two and one half inches in caliper.
11. Petitioners must comply with Maryland State and Montgomery County licensure requirements and standards for the operation of a child day care facility. Petitioners must also comply with their Statement of Operations (Exhibit 8), but the conditions specified in this Opinion and Decision control in the event of any conflict.
12. Petitioners must obtain and satisfy the requirements of all licenses and permits, including but not limited to building permits and use and occupancy permits, necessary to occupy the special exception premises and operate the special exception as granted herein. Petitioners shall at all times ensure that the special exception use and premises comply with all applicable codes (including but not limited to building, life safety and handicapped accessibility requirements), regulations, directives and other governmental requirements.

Dated: May 25, 2012

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Lynn A. Robeson  
Hearing Examiner

## **NOTICE OF RIGHT TO APPEAL**

Any person, board, association, corporation or official aggrieved by a decision of the Hearing Examiner under this section may, within ten days after this decision is rendered, appeal the decision to the County Board of Appeals in accordance with the provisions of Section 59-G-1.12(g) of the Zoning Ordinance.

cc: Petitioners  
All parties of record  
The Planning Board  
Department of Finance  
All parties entitled to notice of filing

## APPENDIX

1. Mrs. Nelly Solano:

Mrs. Solano testified that she wishes to increase the number of children enrolled in her daycare from 12 to 30 children. She stated that she had read the Technical Staff Report and agreed with its findings and conclusions and had decided to withdraw the request for a sign along Darnestown Road. T. 6-7. She identified the photographs in the official record and stated that the fairly and accurately depicted the property. T. 9-16. She also described the interior floor plan, in which the rooms are identified by colors. The driveway is 20 feet wide so that it may accommodate two-way traffic. There is a parking area for parents on the east side of the property. T. 22. There is sufficient space for the parents to turn around and come out. She also has a handicapped parking space in compliance with the Building Code. T. 22-23.

She stated that she is proposing to reduce the amount of existing paving on the property to meet the setback from the east property line. There is sufficient space in the employee parking area, on the western side of the site, for each employee to exit even if all of the parking spaces are occupied. T. 23. One of the employees will be part time. T. 24.

The parents will enter in the rear of the property. Age groups are segregated in rooms painted different colors. The children play in the Yellow Room which also contains a bathroom. There is a utility room which is always closed. Moving south, you find the Red Room and the kitchen and on the left side is the Purple Room. T. 26-27.

Mrs. Solano testified that she proposes to fence the parent parking area with a six-foot solid fence. T. 29. They are going to have to remove one existing maple tree to accommodate the new parking area and will be adding two smaller trees. She proposes 3-foot high shrubbery along the front. T. 31. The area where the asphalt is being removed will be replanted with grass. T. 32.

She has been operating the existing center for 12 years with no complaints from the neighbors and no traffic accidents. They take the children once in the morning and once in the afternoon when the weather permits. They are proposing staggered times for parent arrival. If too many parents want to come at the same time, she tells them they don't have a place for their child. The parent arrival times are staggered in one-half hour increments between 6:30 a.m. and 9:30 a.m. in the morning and 4:00 p.m. to 6:30 p.m. in the evening. Because her State license does not permit her to keep children after 6:30 p.m., she makes sure that they have been picked up by that time. Approximately 20% come during the non-peak hour and several parents have two children at the center and several on the waiting list. T. 33-35.

On cross-examination, Mrs. Solano testified that no vehicles can use the asphalt strip that began at the front of the property and continues to the back yard because of the fencing around the playground. T. 42-43. She did not wish to remove the asphalt paving in the rear yard because of the expense. She uses the asphalt in the play area for children to ride their bikes. T. 43-45. She also stated that she has sinks in every room with foot pedals. The State approved the sinks in the facility. They are proposing an additional toilet as well because of the State requirements. She would agree to a condition of approval requiring re-licensing by the State as that is mandated anyway. T. 47-49. She keeps her garbage inside the garage so they are not accessible to animals. T. 49. She further testified that she hasn't made any provision to add landscaping in the rear of the property because there are a lot of existing trees on the Oxley's property. T. 50-51. They also have a high fence which screens the rear yard, where the children don't go. T. 52.

With regard to Mr. Oxley's testimony about erosion, Mrs. Solano stated that she will be removing a large amount of the existing asphalt in the front, which should help the problem. She

confirmed that Mr. Oxley had complained to the County, but neither of them knew what happened further. T. 57-61.

In response to Mrs. Trunnell's testimony, she testified that she keeps the garbage cans inside her garage so there is no problem with attracting animals. They only time they are outside on trash pick-up days. T. 66-67. As far as creating problems with traffic, she stated that the parents use Route 28 to get to work, so the use is not changing the traffic patterns in the area. She knows this because her only advertisement was a banner sign in front of the property which the parent saw while passing by. T. 67-68.

She also stated that each infant has its own crib. When the children turn two, they sleep on cots rather than mats on the floor. They have one cot for each child and the parents bring blankets from home. She provides the sheets which are washed every week. The kitchen is a warm-up kitchen. With regard to the diapers, they use a new set of gloves for each diaper change and put the diaper into individual plastic bags which are then placed in the trash can. They then remove the gloves before they wash their hands, so the hands are clean when they touch the toilet. T. 88. They reduce the odor from the diapers by disposing of material in the toilet before placing it in the trash. T. 68-69. She doesn't want odor from the diapers in the center because parents will not want their children to stay there. T. 70.

With regard to noise from the playground, they currently have four infants, three children that are three years old and one child that is four years old. The photograph of the northern property line shows that Mrs. Solano can only see the top of the Oxley's house from the playground. Her deck is on the second level of her house, so from their Mrs. Solano can see the deck of the Oxley's house. T. 85. She preferred to plant trees to mitigate the noise rather than stagger times because it is more efficient for her. T. 86.



2. Ms. Jenny Solano:

Ms. Solano testified that she is the Applicant's daughter and the preschool teacher for the existing daycare. She stated that the parents' schedules are naturally varied, so this will not be a problem.

Ms. Solano testified that they could stagger the preschooler's times in the play area to lower the number of children outside at one time. T. 73. They could reduce the number of preschoolers outside to five children at a time.

3. Mr. Roger Oxley:

Mr. Oxley testified that his property is adjacent to the northeast of the Solano's. The shed shown on her site plan is immediately behind his garage. His general objection to the expansion is the increased noise. He can hear the 12 children now and believes that almost doubling the size is going to impede his enjoyment of his own property. T. 55. His deck is immediately behind the fence. He put the fence up to screen the property but it doesn't stop the noise. T. 56.

In addition to noise, he has experienced a significant erosion problem on his yard. He's an engineer, and believes that the paving on the subject property is the cause because his property is downhill from the Solano's property. T. 56. He would like to minimize the water runoff to his property.

4. Mrs. Linda Oxley:

Mrs. Linda Oxley testified that when it rains, a channel is formed along the asphalt strip in the rear of the property, causing the water to rush down. She has ruts on her property and end up almost with a little creek in the back yard. The white pines in the rear of her property do not abatement for noise. Her fence is six feet tall, and she can see into Ms. Solano yard and see the

children. T. 60. According to Mrs. Oxley, many of the neighbors that live close to her complain of the noise.

Mrs. Oxley stated that she and her husband would prefer if Mrs. Solano added some evergreens across the rear yard to provide more screening and further abate the noise. T. 61. She also stated that she would prefer it if the Petitioner were to screen the use from a view from their backyard. T. 80.

5. Mrs. Sylvia Trunnell:

Mrs. Trunnell testified that her driveway access is directly onto Route 28 near Turkey Foot Road. According to her, rush hour begins at 6:30 p.m. Route 28 is a major commuting route for people in upper Montgomery County, and rush hour continues until about 9:00 a.m. Traffic starts again around 2:30 or 3:00 p.m. when school buses begin dropping children off and continues until 7:00 p.m. at night. She has difficulty getting in and out of her driveway. T. 62. A couple of houses north from Mrs. Solano's house are a Harris Teeter and a major stoplight. During rush hour, her husband and she are "essentially prisoners" because they can't get in or out during those hours. T. 62-63.

She also has some health concerns about the use. She is concerned about the odor from the baby's diapers attracting animals while they are in the trash. She is a nurse and where she worked, they required pedal sinks so you don't have to touch the faucets when their hands are dirty. T. 64. She also wanted to know if each child gets to sleep in its own crib. T. 64.

6. Craig Moloney:

Mr. Moloney is an architect that has been assisting the Solano's with the application. He did not think that trees form an effective sound buffer, although they do visually screen the use and

sometimes this has a psychological impact. T. 66. In his experience, the stockade fence is a better sound buffer. T. 66-67.

Mr. Moloney stated that he doesn't feel that the sound from the children is a significant problem because they are only out twice during the day. If the number of children permitted at one time were reduced, then there would be less noise. T. 72. He testified that he lives along Route 28 and he has Leland Cypresses on the east side of the property line, and they've found that it does buffer the noise from their neighbors. T. 79. He also testified that planting trees on the Solano's property would help with any erosion experienced on the Oxley's property because the roots absorb water and stabilize the soil. T. 82. After Mrs. Solano testified that she would place the trees near the shed on the northern property line, Mr. Moloney testified that the trees would be Leyland Cypresses and would be planted three or four feet from the Oxley's property.

7. Mr. Kraig Bauer:

Mr. Bower testified that his eighteen-month old is enrolled at Mrs. Solano's daycare. His daughter is very happy there. Each child has its own crib, and the parents bring in the child's blanket, cups diapers, clothes, and everything is personalized for the child. He has never had an issue getting in and out of the property. The longest wait he has experienced is about 30 seconds. He also supports the facility because it's affordable. He is a teacher, and he and his wife are not going to enroll their children in preschool because a lot of the work is done at the Solano's daycare. Mrs. Solano pro-rates the tuition because his mother watches their children one day a week. T. 75-77.